Supreme Court, U.S.
FILED

981656 JAN 27 1999

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

William E. Cutright

Petioner,

v.

Metropolitan Life Insurance Company, d/b/a "Metlife", Michael A. Schlegel and William Thomas,

Respondents.

Petition for Writ of Certiorari to the West Virginia Supreme Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Brent E. Beveridge, Esq.
Beveridge Law Offices
208 1/2 Adams Street
P.O. Box 1469
Fairmont, WV 26555-1469

7088

QUESTION PRESENTED FOR REVIEW

Whether petitioner was denied due process of afforded by Section 1 of the Fourteenth Amendment of the United States Constitution by the actions of the West Virginia Supreme Court of Appeals in rendering two conflicting decisions in two cases involving the same parties and facts.

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PETITION FOR WRIT OF CERTIORARI

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Attorney for Petitioner

Petitioner William E. Cutright prays that a Writ of Certiorari issue for the judgment order of the West Virginia Supreme Court of Appeals, entered on October 29, 1998.

OPINION OF THE COURT BELOW

The judgment order of the West Virginia Supreme Court of Appeals is found in Appendix A to this Petition.

JURISDICTIONAL STATEMENT

The October 29, 1998 order of the West Virginia Supreme Court of Appeals (Appendix A) refused a Petition for Appeal of an Order of the Harrison County, West Virginia Court (Appendix B) entered on April 20, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

CONSTITUTIONAL PROVISIONS AND STATUTES

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

The questions presented in the instant petition are legal in nature. The following provides a concise overview of the factual and procedural background upon which the present issues are predicated.

On February 28, 1995, plaintiff William Cutright filed an Eight Count Complaint in the Harrison County Circuit Court against Metropolitan Life Insurance Company, d/b/a "MetLife", (hereinafter "Metropolitan"), Michael A. Schlegel and William Thomas. Only Count Two is material to this proceeding.

Count Two alleged that Cutright had been wrongfully discharged from his employment with Metropolitan Life in violation of W. Va. Code § 33-12-1, In addition to alleging that the notice of termination was insufficient, plaintiff Cutright alleged that the reasons for termination asserted by Metropolitan were insufficient "just cause" under W.Va. Code § 33-12A-3, a West Virginia's statute enumerating specific grounds for terminating an insurance agent.

Paragraph 16 of the complaint alleged:

> "16. Upon termination, Cutright was informed by Thomas that he was being terminated for insubordination and unprofessional conduct, both of which Cutright expressly denies. At the request of the West Virginia Bureau of Employment Programs, Unemployment Compensation Division, on November 14, 1994, MetLife asserted that Cutright was discharged for insubordination and unprofessional conduct. These two reasons for termination were again offered by MetLife at a January 25, 1995, unemployment compensation hearing held at MetLife's request. Upon the termination of Cutright's NASD registration, MetLife informed the National Association of Securities Dealers that Cutright was terminated

for these same two stated reasons."

Metropolitan filed an answer in response to Count Two, paragraph 16, which admitted that "16 . . . Defendant Thomas informed plaintiff that he was terminated for insubordination and unprofessional conduct. . ." and specifically averred the truth of those allegations. The answer further admitted all of the remaining allegations.

Discovery in the case was conducted on the theory that Cutright was fired for insubordination and unprofessional conduct. After discovery was completed, the defendants filed a motion for leave to amend its answer on February 1, 1996. The motion was noticed for hearing on February 13, 1996, some seven days before trial.

The only substantive addition to the proposed amended answer was to allege in paragraphs 18 and 24 of the answer to Count II was an allegation that W. Va. Code § 33-12A-1 et seq was in violation of the West Virginia and United States Constitutions. The defense of unconstitutionality contained no specific reference to the constitutional protection violated and was not designated as an affirmative defense.

The motion for leave to amend the answer was argued on February 13 and 16, 1996 in conjunction with a Motion to Strike Jury Demand. The basis for the claim of unconstitutionality was that a trial by jury in a claim for the violation of W. Va. Code § 33-12A-3 was an equitable action and consequently denied Metropolitan equal protection and due process of law.

The Court orally indicated that it was inclined to grant the amendment to the answer at the pre-trial hearing held on February 16, 1996. A proposed order granting leave to amend the answer was submitted with the motion, but the order was never entered by the Court.

On February 22, 1996, the jury returned a verdict in favor of the plaintiff on Count II of the complaint and awarded him

$1,000,000 in damages.

Metropolitan filed a Motion for Judgment Notwithstanding the Verdict asserting among other grounds that W. Va. Code § 33-12A-1 et seq. is preempted and invalidated by the Supremacy Clause of the United States Constitution. Specifically the defendants alleged that the just cause for discharge requirements of W. Va. Code § 33-12A-3 interfered with or are contrary to Title VII. The post-trial motions were denied by this Court.

Both Cutright, (Case No. 23884) and Metropolitan (Case No. 23956) appealed the jury verdict to the West Virginia Supreme Court of Appeals.

A separate action over Cutright's unemployment compensation was also litigated in the Kanawha County Circuit Court. The Kanawha County Circuit Court found in favor of Cutright by determining that his termination for the alleged reason of insubordination was not misconduct within the meaning of the unemployment compensation statute. Metropolitan. (Case No. 23365) appealed the decision of the Kanawha County Circuit Court to the West Virginia Supreme Court of Appeals.

On July 11, 1997, the Supreme Court filed a decision in Case Nos. 23884 and 23956 wherein the jury verdict of $1,000,000 was vacated on the grounds that W. Va. Code § 33-12A-1 et seq. was preempted by federal law in violation of the Supremacy Clause of the United States Constitution. Three days later the Supreme Court rendered a decision affirming the decision of the Kanawha County Circuit Court which had found that Cutright was discharged but not for misconduct.

The intrinsic conflict between these two decisions was raised in the Harrison County Circuit Court on January 30. 1998. The Rule 60(b) motion asserted that the West Virginia Supreme Court's two conflicting decisions involving the same parties and facts should be resolved by the Harrison County Circuit Court, declaring the Supreme Court's decision vacating the jury verdict to

be a nullity on the theory of issue preclusion.

By an order entered on April 21, 1998 (Appendix B), the Harrison County Circuit Court denied the Rule 60(b)motion by finding that the Court lacked jurisdiction for a Rule 60(b) Motion and that no fraud upon the Court had been committed by the defendants.

On September 8, 1998, Cutright filed a Petition for an Appeal with the West Virginia Supreme Court of Appeals appealing the Harrison County Circuit Court's denial of the Rule 60(b) motion. The petition assigned as error: "(1) The trial court erred in refusing to rule that the West Virginia Supreme Court's opinion in Case No. 23884 null and void; (2) The trial court erred in refusing to rule that Metropolitan perpetrated a fraud on the Court by filing an amended answer without obtaining leave of court; and (3) The trial court erred in determining that it lacked jurisdiction to vacate and void a judgment of the West Virginia Supreme Court."

By an order entered on October 29, 1998, the West Virginia Supreme Court refused to consider the Petition for an Appeal without a written opinion.

REASON FOR GRANTING THE WRIT

United States Supreme Court Rule 19(c) setforth, as a reason for granting certiorari, that a state court has decided an import federal question in a way that conflicts with applicable decisions of this Court and the Constitution of the United States.

A. CONFLICTING DECISIONS RENDERED

BY THE WEST VIRGINIA SUPREME COURT ARE A DENIAL OF DUE PROCESS OF LAW

Petitioner, William E. Cutright's employment relationship with Metropolitan Life Insurance Company d/b/a "Met Life" (hereinafter Metropolitan) has been the subject of two opinions (Appendix C) of the West Virginia Supreme Court of Appeals. In Case No. 23365, (Appendix C), the West Virginia Court ruled in Cutright's favor that he was not discharged for misconduct and was entitled to unemployment benefits. In consolidated Case Nos. 23956 and 23384 (Appendix B), the same Court vacated a jury verdict awarding Cutright $1,000,000 and held that Cutright was discharged for sexual harassment of co-workers in violation of Title VIII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. which in turn preempted a West Virginia statute which afforded just cause to insurance agents.

Unquestionably, the Supreme Court was cognizant of the two parallel appellate proceedings arising out of the termination of Cutright's employment with Metropolitan. This is evidenced by footnote 2 and Justice Workman's dissent in the unemployment compensation opinion, 490 S.E.2d at 745 and 748.

Most significant is Justice Workman's dissenting comment on the majority's treatment of the allegations that Cutright violated Title VII:

> "Moreover, the majority wrongly decided to gloss over the additional allegations of misconduct involving Mr. Cutright's habit of making derogatory and demeaning comments with regard to a female clerk and his boisterous and profane demeanor within the office. The existence of these allegations certainly should

> have been considered in determining whether Mr. Cutright was entitled to unemployment benefits since that conduct was part of the initial evidence used to support the employer's position that his misconduct barred him from receiving benefits for the period of time provided by statute. See W. Va. § 21A-6-3." emphasis added.
> 490 S.E.2d at 748

It is obvious from Justice Workman's conclusion that the majority glossed over misconduct that the Court did consider the allegations of demeaning comments to a female clerk and boisterous and profane office conduct in determining that Cutright was not guilty of misconduct.

Despite the fact that the two cases can be distinguished on the basis of the statutes involved, they cannot be reconciled on the application of the preemption doctrine. Quite simply, how can Title VII preempt the just cause provisions of W. Va. Code § 33-12A-3 and not the misconduct disqualification of W. Va. Code § 21A-6-3 when the same conduct is at issue?

Ordinarily, an appellate court's determination on an issue becomes res judicata on subsequent determination of the same issue within the same case. State ex rel Adkins v. Sims, 130 W.Va. 645, 46 S.E.2d 81 (1947). The Supreme Court in its July 11, 1997 opinion, made the determination in the appeal of the discharge case as a matter of law that (1) Cutright was guilty of sexual harassment in violation of Title VII and (2) the violation of Title VII preempted any just cause protection under W. Va. Code § 33-12A-3. Four days later the Court declined to find misconduct based upon the same facts and more importantly did not apply the preemption doctrine to the unemployment compensation misconduct

provisions of W. Va. Code § 21A-6-3.

The two conflicting decisions leaves the question of whether Cutright was discharged from his employment for sexual harassment unresolved. Which decision is the law of this case? If Justice Workman's dissent properly identifies the facts the majority considered in the unemployment compensation appeal, the Supreme Court nullified its initial determination that Cutright was guilty of sexual harassment misconduct by the second decision which found no misconduct.

The real enigma in this case is that this Court had the same set of facts before it in two separate cases and reached different results. In the discharge case, the conduct was labelled sexual harassment which preempted the just cause for discharge statute. In the unemployment case, the same conduct was labelled as unprofessional conduct and was determined not to be misconduct for denying unemployment compensation benefits.

It is important to note that the trial court's final decision in the unemployment compensation case finding no misconduct by Cutright was rendered in October, 1995, prior to the jury verdict in the employment discharge case. The claim that Cutright had in engaged in sexual harassment could have been but was not raised in the unemployment compensation case.

The Kanawha County Circuit Court's ruling in the unemployment compensation and its subsequent affirmance by the Supreme Court serves to bar the claim that Cutright was discharged for sexual harassment under the doctrine of quasi estoppel. The doctrine of quasi estoppel precludes a party from asserting to another's disadvantage a right inconsistent with a position previously taken by the party. Petition of Shiflett, 200 W.Va. 814, 490 S.E.2d 902 (1997).

The failure to assert the claim of sexual harassment in the unemployment compensation case amounts to a waiver and preclusion in the discharge case. It is readily apparent that Metropolitan took an inconsistent position in the two proceedings. This Court in return reached two seemingly irreconcilable positions on the same facts. The doctrine of quasi estoppel dictates that this Court was bound only to consider the initial grounds for discharge based upon unprofessional conduct and insubordination. The claim that Cutright was discharged for sexual harassment did not surface until midway through the trial and as an afterthought. This shift to an artificial designation of sexual harassment is barred by quasi estoppel.

Petitioner sought to have both the Harrison County Circuit Court and the West Virginia Supreme Court of Appeals resolve the apparent conflict between the two decisions by litigating the Rule 60(b) motion. Pursuant to the West Virginia procedural law, a Rule 60(b) is an appropriate means to seek clarification of the conflict between the two decisions. Powderridge Unit Owners Association v. Highland Properties, LTD, 474 S.E. 2d 872, 885 (W. Va. 1996)

Ordinarily, erroneous or conflicting decisions rendered by the highest court of a State is not a denial of due process of law under Section 1 of the Fourteenth Amendment of the United States Constitution unless the decisions are arbitrary, capricious or are "in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.'" American Rv Express Co. v. Commonwealth of Kentucky, U.S. 475. Ct. 353, 355 (1927) quoting from Pennover v. Neff, 195 U.S. 714, 733 and citing Booth v. Illinois, 184 U.S. 425, 429, 22 S.Ct. 425; Truax v. Corrigan, 257 U.S. 312, 329, 425 S.Ct. 124.

In this instance, the conflict is intrinsic within the same case involving the same parties and the same facts. Rule 60(b) of the West Virginia Rules of Civil Procedure provide a mechanism by which the West Virginia Supreme Court could have resolved the conflict but the Court by declining to accept the appeal arbitrarily and capriciously passed upon the opportunity.

Arbitrariness and capriciousness are vague and elusive concepts. Under the due process standards of the Fourteenth Amendment, these concepts are satisfied by demonstrating that a litigant had a full and fair opportunity to be heard by the highest Court of the State. Central Land Co. of West Virginia v. Laidley 159U.S. 103, 16S.Ct.80 (1895)

The failure to reconcile the decisions goes beyond merely rendering an erroneous decision or changing a decision by a subsequent decision. Fundamental legal principles dictate that a Court should provide a finality to the rights of parties before the Court. There is no finality when the Court does not establish the law of the case.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted.
Brent E. Beveridge, Esq.
208 1/2 Adams Street
Fairmont, WV 26555-1469

Counsel for Petitioner

APPENDICES

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APPENDIX A

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

WILLIAM E. CUTRIGHT,

Plaintiff.

v. 95-C-131-2

METROPOLITAN LIFE INSURANCE COMPANY, d/b/a "METLIFE", MICHAEL A. SCHLEGEL and WILLIAM THOMAS,

Defendants.

MOTION FOR RELIEF FROM JUDGMENT

Now comes the plaintiff, William E. Cutright, pursuant to Rule 60(b)(3), (4) and (6) of the West Virginia Rules of Civil Procedure and moves the Court to declare the final judgment ordered entered herein null and void.

In support of said motion, the plaintiff alleges:

1. Plaintiff was discharged from his employment with defendant Metropolitan Life Insurance Company (hereinafter "MetLife") on October 14, 1994 for the expressed reasons of insubordination and unprofessional conduct.

2. On November 14, 1994, defendant MetLife informed the West Virginia Department of Employment Security that plaintiff William E. Cutright was discharged for insubordination and unprofessional conduct.

3. On January 25, 1995, defendant MetLife notified the National Association of Security Dealers that plaintiff William E. Cutright was terminated for insubordination and unprofessional conduct.

4. On February 28, 1995, plaintiff William E. Cutright filed the complaint in this action and alleged in paragraphs 16 and 18:

> "16. Upon termination, Cutright was informed by Thomas that he was being terminated for insubordination and unprofessional conduct, both of which Cutright expressly denies. At the request of the West Virginia Bureau of Employment Programs, Unemployment Compensation Division, on November 14, 1994, MetLife asserted that Cutright was discharged for insubordination and unprofessional conduct. These two reasons for termination were again offered by MetLife at a January 25, 1995, unemployment compensation hearing held at MetLife's request. Upon the termination of Cutright's NASD registration, MetLife informed the National Association of Securities Dealers that Cutright was terminated for these same two stated reasons.
>
> 18. West Virginia Code § 33-12A-1 et seq. regulates the contractual relationship between insurance carriers and their agents. West Virginia Code § 33-12A-3 [Termination of contractual relationship] states:
> No insurance company may cancel, refuse to renew or otherwise terminate a written contractual relationship with any insurance agent who has been employed or appointed pursuant to that written contract by such insurance company for a period of more than five years, except for "good cause", as prescribed herein. If an insurance company proposes to cancel, fail to renew or otherwise terminate a contractual relationship with the agent, the company shall so notify the agent

by certified mail at least ninety days prior to the date upon which the company proposed to cancel, fail to renew or terminate the contractual relationship. Such notice shall include a statement of the grounds upon which the insurance company bases its decision to cancel, refuse to renew or termination any contractual relationship.

The following matters are "good cause" for an insurance company to terminate the contractual relationship with its agent:

(a) Criminal misconduct or gross negligence relating to the business or premises of the insurance agency;

(b) Fraud or moral turpitude;

(c) Abandonment or unattendance of the business or premises of the insurance agency for such period of time as may unreasonably interfere with the transacting of business;

(d) The failure by the agent to pay moneys over to the company for insurance contracts sold by the agency;

(e) The death or disability of the agent; and

(f) Upon the company becoming insolvent or discontinuing any line of insurance for any business purpose: Provided, That the insurance commissioner shall notify or cause to be notified in writing all agents of such insolvent insurance company that they are no longer entitled to any benefit under their contract with the insolvent company."

5. On March 30, 1995, defendants MetLife, Michael A. Schlegel and William Thomas filed an Answer, Defenses and Counterclaim which among other allegations alleged in response to Count II, paragraphs 16 and 18:

> "16. Defendants admit that Defendant Thomas informed plaintiff that he was terminated for insubordination and unprofessional conduct, and specifically avers the truth of those representations. Defendants admit the remaining of the allegations set forth in Paragraph 16 of the Complaint.
>
> 18. Defendants deny the allegations set forth in Paragraph 18 of the Complaint. Defendants aver that W. Va. Code § 33-12A-1, et seq. speak for themselves."

6. On or about February 1, 1996, defendants MetLife, Michael A. Schlegel and William Thomas filed a Motion for Leave to File Amended Answer Instanter and a proposed Amended Answer, Defenses and Counterclaims of Metropolitan Life Insurance Company, Michael A. Schlegel and William Thomas to the Plaintiff's "Complaint and Petition for Declaratory Judgment".

7. An order granting the Motion for Leave to Amend was never entered by the Court.

8. The Amended Answer in response to paragraphs 16 and 18 of the Complaint alleged:

> "16. Defendants admit that Defendant Thomas informed Plaintiff that he was terminated for insubordination and unprofessional conduct, and

specifically avers the truth of those representations. Defendants admit the remaining of the allegations set forth in Paragraph 16 of the Complaint.

18. Defendants deny the allegations set forth in Paragraph 18 of the Complaint. Defendants aver that W. Va. Code §§ 33-12A-1, et seq. speak for themselves, and further state that these provisions are unconstitutional and violate the Constitution of the State of West Virginia and the Constitution of the United States."

9. The insertion of an additional defense in paragraph 18 of the amended answer raised the issue that W.Va. Code § 33-12A-1, et seq. are violative of the Constitution of the State of West Virginia and the Constitution of the United States.

10. The defendants' purpose in including the additional allegation challenging the constitutionality of W.Va. Code § 33-12A-1, et seq. was to lay the foundation of contending that the Supremacy Clause of the United States Constitution mandated that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. pre-empted W.Va. Code § 33-12A-1, et seq.

11. During the course of the trial of this case, the defendants, at the conclusion of the plaintiff's case in chief and at the conclusion of all the evidence, moved for a directed verdict alleging that the notice and just cause provisions of West Virginia Code § 33-12-1 were unconstitutional under the Supremacy clause of the United States Constitution.

12. The motions for a directed verdict were denied.

13. On February 28, 1996, this Court entered judgment on a jury verdict

rendered on February 22, 1996, awarding plaintiff the sum of $1,010,221.01.

14. On March 8, 1996, the defendants filed a Motion for Judgment Notwithstanding the Verdict or Alternatively, Motion for a New Trial and Defendants' Motion to Amend Judgment Order, again raising the pre-emption issue.

15. Defendants' post-trial motions were denied by this Court by an order entered on April 22, 1996.

16. On August 22, 1996, the defendants filed an appeal to the West Virginia Supreme Court of Appeals alleging among other grounds that the judgment order entered on February 28, 1996, was impermissible in conflict with Title VII of the Civil Rights Act of 1964 in violation of the Supremacy Clause of the United States Constitution.

17. On July 11, 1997, the West Virginia Supreme Court of Appeals rendered an opinion in Case No. 23884 vacating the portion of the judgment order awarding plaintiff in the sum of $1,010,221.01 against defendant MetLife on the grounds that the Supremacy Clause of the United States Constitution invalidated the state law upon which the judgment was based with the following Syllabus by the Court:

> "1. The Supremacy Clause of the United States Constitution, Article VI, Cause 2, invalidates state laws that interfere with or are contrary to federal law.
>
> 2. When a workplace is permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and

create an abusive working environment, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1994) is violated.

3. Insofar as any provision of W.Va. Code § 33-12A-1 *et seq.* conflicts with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1994), Title VII controls pursuant to the Supremacy Clause of the United States Constitution, and, therefore, an insurance company may terminate the employment of an insurance agent for creating a discriminatorily hostile or abusive work environment."

18. Plaintiff William E. Cutright and defendant Metropolitan Life Insurance Company were also parties to litigation contesting plaintiff's entitlement to unemployment benefits.

19. On March 23, 1995, the West Virginia Department of Employment Review entered an order declaring that William E. Cutright was eligible for unemployment benefits and that he had been discharged but not for misconduct.

20. On April 21, 1995, defendant MetLife appealed the decision of the Board of Review to the Kanawha County Circuit Court.

21. By an order entered on October 17, 1995, the Kanawha County Circuit Court affirmed the decision of the Board of Review and found that William E. Cutright was eligible for unemployment benefits.

22. Defendant MetLife appealed the decision of the Kanawha County Circuit

Court to the West Virginia Supreme Court of Appeals.

23. On July 15, 1997, the West Virginia Supreme Court of Appeals rendered an opinion in Case No. 23365 affirming the decisions of the Board of Review and the Kanawha County Circuit Court wherein plaintiff was eligible for unemployment compensation benefits having been discharged but not for misconduct.

The grounds for plaintiff's motion requesting that the jury verdict be reinstated and that the order reversing the judgment herein be declared null and void are:

A. The opinion of the West Virginia Supreme Court of Appeals in Case No. 23365 renders the Supreme Court's opinion in Case No. 23884 null and void;

B. The defendants' claims before this Court and the West Virginia Supreme Court of Appeals that the plaintiff was discharged for violations of Title VII of the 1964 Civil Rights Act was precluded by the failure to raise the issue in its pleadings and by their answer admitting that plaintiff was discharged for unprofessional conduct and insubordination.

C. The defendants' claim before this Court and the West Virginia Supreme Court of Appeals that plaintiff was discharged for violations of Title VII of the 1964 Civil Rights Act was precluded by the decision of the West Virginia Supreme Court in Case No. 23365.

D. The defendants' filing of an Amended Answer without first obtaining leave of Court as required by Rule 15(a) of the West Virginia Rules of Civil Procedure constitutes a fraud upon the Court thereby nullifying any judgment based upon the constitutionality of West Virginia Code § 33-12A-1, et seq.

WHEREFORE, plaintiff moves the Court for relief from the judgment order of this Court voiding the jury verdict in the sum of $1,010,221.01 entered herein on February 28, 1996.

WILLIAM E. CUTRIGHT,
Plaintiff by Counsel

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(304) 363-1907

Counsel for Plaintiff

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

WILLIAM E. CUTRIGHT,

Plaintiff,

v. 95-C-131-2

METROPOLITAN LIFE INSURANCE COMPANY, d/b/a "METLIFE", MICHAEL A. SCHLEGEL and WILLIAM THOMAS,

Defendants.

CERTIFICATE OF SERVICE

I, BRENT E. BEVERIDGE, counsel of record for the plaintiff, do hereby certify that on the ____ day of January, 1998, I served the foregoing "Notice of Hearing" and"Motion for Relief from Judgment" upon the defendants by mailing a true copy thereof, by United States mail, postage prepaid, to:

Jeffrey A. Kimble, Esq.
Shawn Morgan, Esq.
Robinson & McElwee
168 West Main Street
Clarksburg, WV 26301

Adele E. O'Conner, Esq.
Christopher C. Russell, Esq.
Porter, Wright, Morris & Arthur
41 South High Street
Columbus, OH 43215

_____
Counsel for Plaintiff

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

WILLIAM E. CUTRIGHT,

Plaintiff,

v. Civil Action No. 95-C-131-2

METROPOLITAN LIFE INSURANCE COMPANY, d/b/a "METLIFE", MICHAEL A. SCHLEGEL and WILLIAM THOMAS,

Defendants.

ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT

On March 24, 1998, came the plaintiff William Cutright by his counsel, Brent E. Beveridge, and also came the defendant Metropolitan Life Insurance Company, Michael A. Schlegel and William Thomas by their counsel, Jeffrey Kimble, pursuant to the plaintiff's Motion for Relief from Judgment.

Whereupon the Court considered the plaintiff's written motion and supporting memorandum and the defendants' responsive memorandum. The Court did further entertain oral argument from counsel. After consideration of all of which the Court did deny the plaintiff's motion and made the following findings:

1. This Court does not have the authority to vacate and void a final judgment of the West Virginia Supreme Court of Appeals pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure.

2. The defendants did not commit a fraud on the

Court in filing their amended answer in that the Court orally granted the defendants leave to file an amended answer.

3. The defendants did not commit a fraud on the Court failing to specifically plead the unconstitutionality of West Virginia Code § 33-12A-1 et seq. in that the plaintiff had notice of the defense from the amended answer filed with the Court and oral argument before the Court.

4. The plaintiff's Rule 60(b) motion contains allegations and grounds that either were raised or could have been raised in the appeal to the Supreme Court and as a result can not be considered or raised for the first time in a Rule 60(b) motion.

5. This Court lacks jurisdiction to determine whether the decision in West Virginia Supreme Court Case No. 23365 either nullifies or precludes enforcement of the decision in Supreme Court Case No. 23884.

6. The plaintiff is not entitled to any relief under Rule 60(b)(3)(4) and/or (6).

THEREFORE, it is **ORDERED** that the plaintiff's Motion for Relief from Judgment pursuant to Rule 60(b)(3)(4) and/or (6) be and is hereby denied.

ENTER:_____

_____

JUDGE

STATE OF WEST VIRGINIA
COUNTY OF HARRISON, TO-WIT:

I, Charlotte J. Sharpe, Clerk of the Fiftennth Judicial Circuit of Harrison County, West Virginia, hereby certify the foregoing to be a true copy of the ORDER entered in the above styled action on the 20th day of April, 1998.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the Seal of the Court this the 21st day of April, 1998.

_____

Charlotte J. Sharpe
Circuit Court Clerk
Fifteenth Judicial Circuit
Harrison County, West Virginia

APPENDIX B

IN THE SUPREME COURT OF APPEALS
WEST VIRGINIA
Term

No. 23884

WILLIAM E. CUTRIGHT,
Appellant
v.
METROPOLITAN LIFE INSURANCE
COMPANY, ET AL.,
Appellees

AND

No. 23956

WILLIAM E. CUTRIGHT
Appellee
v.
METROPOLITAN LIFE INSURANCE
COMPANY, ET AL.,
Appellants

Appeal from the Circuit Court of Harrison County
Honorable Thomas A. Bedell, Judge
Civil Action No. 95C-131-2
AFFIRMED IN PART AND REVERSED IN PART

SYLLABUS BY THE COURT

1. The Supremacy Clause of the United States Constitution, Article VI, Clause 2, invalidates state laws that interfere with or are contrary to federal law.

2. When a workplace is permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1994), is violated.

3. Insofar as any provision of W.Va. Code § 33-12A-1 *et seq.* conflicts with Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* (1994), Title VII controls pursuant to the Supremacy Clause of the United States Constitution, and, therefore, an insurance company may terminate the employment of an insurance agent for creating a discriminatorily hostile or abusive work environment.

Maynard Justice: William E. Cutright sued Metropolitan Life Insurance Company (Metropolitan), Regional Manager Michael A. Schlegel and Branch Manager William Thomas for damages arising out of the termination of his employment as an insurance agent with Metropolitan. Both Cutright and Metropolitan filed motions for summary judgment in the Circuit Court of Harrison County, West Virginia. The circuit court granted both sides partial summary relief; however, the questions relating to damages for termination of employment in violation of state law and for accumulated vacation pay were presented before a jury. The jury awarded damages in the amount of$1, 010, 221.01. Judgment for this amount plus costs and attorney fees was entered against Metropolitan, whose motions for judgment notwithstanding the verdict and a new trial were denied.

Cutright appeals to this Court, requesting that the circuit court's granting of summary judgment to Metropolitan, Schlegel and Thomas be reversed. Metropolitan cross-appeals, requesting that the circuit court's granting of summary judgment regarding liability for termination in violation of state law be reversed. These cases have been consolidated on appeal. We believe the court's ruling on the issue of liability should be reversed, but the remainder of the court's summary judgment rulings should be affirmed. Therefore, we affirm in part and reverse in part.

Metropolitan is a mutual life insurance company licensed by the Insurance Commissioner t sell life insurance and sickness and accident insurance in the State of West Virginia. Cutright is a former employee of Metropolitan, who worked for Metropolitan from February 1, 1988, the date he first signed an agreement not to compete, until October 12, 1994. Cutright was employed to work in Metropolitan's Clarksburg, West Virginia, office. Initially, Cutright was employed as an account representative. On January 2, 1989, he was promoted to branch manager. On January 3, 1989, he executed another agreement not to compete. Thereafter, on March 7, 1994, Cutright,

voluntarily resigned as branch manager and resumed the position of account representative.; William Thomas, who had worked as an agent under Cutright, was promoted to the position of branch manager. Cutright held the position of account representative until his employment was terminated by Metropolitan on October 14, 1994, due to insubordination and unprofessional conduct.

After Cutright stepped down from his position as manager, Metropolitan's management began receiving complaints about his hostile, abusive and unprofessional treatment of female co-workers. Margaret Fisher was the branch administrator. Peggy Morris was a senior sales assistant and Sandra Lehosit was a senior clerical assistant. The clerical support staff in the Clarksburg office consisted of these three employees, all females. Margaret Fisher stated in her deposition that Cutright repeatedly yelled at the women. Often adding profanity. Fisher also stated he "cursed and yelled and threw things" and even threatened to break the computer. He told one worker her work was "bullshit" and called her a "god-damn-son-of-a-bitch." Thomas, the branch manager, stated in his affidavit that he personally observed Cutright use profanity and yell and curse at the administrative staff. The situation became so bad that the regional manager, Michael Schlegel, asked Fisher and Lehosit to inform him of additional improper behavior.

The clerical employees also complained about the vacation policy that Cutright initiated and enforced. Initially, Cutright told the female clerical workers that they could have no more than two weeks of vacation in a row, no more than two weeks of vacation in a given month, and no vacation could be taken in October, November and December. He later changed the policy to no more than five days of vacation in a row, no more than two weeks of vacation in a month, the weeks could not be together, and no vacation time off in October, November and December. In June 1990, Sandra Lehosit and her husband

made vacation plans in advance. Lehosit's husband was a factory worker, whose schedule was not flexible, so he did not have the option of changing his vacation plans. Because of the vacation policy change imposed by Cutright, Ms. Lehosit was forced to cancel her plans and her husband had to go on his vacation without her.

In September 1994, the regional manager met with the female clerical staff to discuss their concerns about the abusive treatment. That same day, the regional manager and the branch manager met with Cutright to discuss the concerns of the clerical staff and to attempt to clear up the problems;. Apparently, the meeting had little or no effect. In early October 1994, less than one month after the meeting where Cutright had been cautioned about such conduct, another incident involving crass, hostile behavior and the use of profanity occurred. One evening, as Cutright was leaving Metropolitan's premises, he stated that Peggy Morris was a "fat ass bitch," and added, "those f_____ people are nuts." He admits he made both comments, but states he called Morris only a "fat ass." Finally, Cutright's outrageous treatment of the female clerical employees prompted Margaret Fisher to send an e-mail to Schlegel, informing the regional manager that " the girls are at their breaking point and we cannot continue to take this" kind of treatment from Cutright. One week later, Cutright's employment with Metropolitan was terminated.

The record is replete with numerous other allegations and admissions. Cutright admits he stored and consumed alcohol on company premises in violation of the Manual of Instructions. He also insisted in smoking inside when the company had a non-smoking policy. He signed a policy of insurance affirming he had witnesses the policyholder's signature affirming he had witnesses the policyholder's signature when, in fact, he had not witnessed the signature.

Cutright also personally retained an assistant, Shellie Davis, to work for him. Davis was previously a Metropolitan employee, whose employment with the company had been terminated. Even though Davis was no longer a Metropolitan employee, Cutright continued to allow her to have full access to Metropolitan's computer system, SONIC. Thomas informed Cutright that Davis could no longer access customer information on the SONIC computer. Schlegel informed Cutright in writing that access to SONIC must be limited to Metropolitan employees because of security reasons and liability concerns. Cutright responded to Schlegel by stating in writing that he would use the computer to enhance his business until he received notice from the legal department notifying all within Metropolitan that this practice was not condoned and must be stopped by all who were utilizing the system. The company sent Cutright a letter, suggesting that Davis become a variable part-time employee;. He failed to respond to this suggestion, but contends Davis stopped accessing SONIC on September 20, 1994, the date a region-wide letter was distributed.

At Metropolitan, the branch manager, not account representatives, handle consumer complaints. Nonetheless, Cutright refused to turn over the consumer complaint files that were in his possession when he stepped down from the position of branch manager. He was repeatedly asked to turn over the files, but flatly refused to do so. He even obstinately refused to comply with a direct order of the regional manager. Cutright also admits that when he left Metropolitan, he took with him 2,000 customer files, all client records and "things of that nature" that were in his possession. He repeatedly refused to return the files and records until he was finally ordered by the circuit court to do so.

Sandra Lehosit testified in her deposition that Cutright's wife came into the Metropolitan office openly carrying a pistol in her hand on the day Cutright was terminated. Cutright's wife

walked over to Lehosit's desk, pistol in hand, stating she wanted to talk to Lehosit. While standing over the desk and holding the pistol, she stated that it was the women's fault the lives of Cutright, herself, and their children had been ruined by the termination. Lehosit tried to calm her. Ms. Cutright handed the gun to Thomas when he opened the door to his office. She then left, only to return later in the day to continue her tirade. It later turned out the gun was not loaded and was a "BB" or pellet gun, which had been borrowed from a co-worker and was being returned. However, this fact was not known at the time Ms. Cutright entered the office carrying a gun and accosted Sandra Lehosit with it.

Cutright contends that Schlegel's secretary heard Schlegel tell somebody over the telephone that he "had enough to put Cutright behind bars." The secretary supposedly told a Metropolitan employee, who told another Metropolitan employee, who finally conveyed this information to Cutright. Based on this assertion, Cutright included a claim for defamation in his complaint.

Cutright filed a six-count complaint and also sought declaratory judgment on two counts in circuit court. The six counts include: Count I, wrongful discharge for whistleblower activities; Count II, discharge in violation of W.Va. Code § 33-12A-3; Count III, violation of W.Va Code § 21-5-1, regarding payment for accumulated vacation time; Count IV, tortious interference with third party contract;[1] Count V, tortious interference with prospective business relationships;[2] and Count

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[1] Count IV alleges Schlegel and Thomas pretextually terminated Cutright's contractual relationship with Metropolitan.

[2] Count V alleges Metropolitan and Thomas sent letters to various

VI, defamation. Cutright sought declaratory judgment regarding Count VII, requesting that the agreements not to compete, which he had signed, be declared invalid; and Count VIII, requesting that the 2,000 customer files retained by Cutright upon his termination be declared his.

Metropolitan counterclaimed, seeking preliminary and permanent relief to enforce the agreements not to compete and to retrieve the customer files. Following a hearing, the circuit court granted a preliminary injunction to Metropolitan and ordered Cutright to return all of the files and to abide by the terms of the agreements he had executed.

When discovery was completed, Cutright and Metropolitan both moved for summary judgment. Metropolitan sought judgment on all counts of the complaint and on their counterclaim. Cutright sought summary judgment on the counts dealing with discharge in violation of state law and accrued vacation pay. The court found "that Metropolitan has demonstrated a legitimate, non-pretextual and non-retaliatory reason for Plaintiff's discharge. The record is replete with evidence documenting complaints of Plaintiff's conduct toward the Branch Manager and Branch Administrator , including complaints of insubordinate remarks." Therefore, the court granted Metropolitan summary judgment as to the wrongful discharge claim or Count I of the complaint.

The court also found "that [Cutright's] several appointments, together with the Manual of Instructions for Sales Representatives created a written contractual relationship for in excess of five years as a matter of law[,]" and "that the Plaintiff

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Metropolitan policyholders, which interfered with Cutright's expectation that he would continue to be employed in the insurance industry and would be able to market products to his former clientele.

was not notified of the termination of his contractual relationship with Metropolitan by certified mail at least ninety (90) days prior to the date of his termination, nor provided with a statement of the grounds upon which Metropolitan based its decision to terminate the contractual relationship, and that the grounds for termination are not statutorily sufficient." Therefore, the court granted Cutright summary judgment as to liability regarding termination in violation of state law or Count II of the complaint.

The court denied summary judgment regarding accumulated vacation pay. As to Cutright's contention that Schlegel's and Thomas' action in terminating him deprived him of the benefit of his contract and tortiously interfered with his contractual relationship with Metropolitan, the court granted the defendants summary judgment. As to Cutright's contention that Metropolitan and Thomas tortiously interfered with prospective business relationships, the court also granted the defendants summary judgment. Schlegel and Thomas were then dismissed from the action with prejudice. As to the defamation claim against Schlegel, the court granted Schlegel summary judgment. The court concluded the agreements not to compete were valid and enforceable and the policyholders' files belonged to Metropolitan; therefore, Metropolitan was granted summary judgment on these counts and on Metropolitan's counterclaim. A trial date was set to determine damages regarding discharge in violation of state law and accumulated vacation pay.

At trial, following Cutright's presentation of evidence, Metropolitan moved for a directed verdict regarding Cutright's contention that he was discharged in violation of state law. Metropolitan argued the W. Va. Code § 33-12A-1 *et seq.* violates the Supremacy Clause of the United States Constitution. Metropolitan also argued that the company is authorized to sell only life insurance and sickness and accident insurance in West Virginia, thus exempting it from the provisions of this statute.

The court denied the motion for a directed verdict. At the end of the trial, Metropolitan renewed its motion for a direct verdict. The court once again denied the motion. The court also denied Cutright's motion for a directed verdict on damages.

The jury returned a verdict of $1,000,000 on Cutright's claim that he was discharged in violation of state law and $10,221.01 for accumulated vacation pay. The court entered a judgment order against Metropolitan on February 28, 1996. Metropolitan timely filed a motion for judgment notwithstanding the verdict, or, in the alternative, a new trial, reiterating all of its former arguments. The court denied this motion on April 22, 1996. It is from this order that Cutright and Metropolitan filed cross-appeals in this court. These appeals have been consolidated on appeal for purposes of writing this opinion.

On appeal, Cutright assigns several errors. He contends the circuit court erred in granting summary judgment; (1) as to count I of the complaint, because he articulated a cognizable public policy and there was a triable issue of fact as to whether the reasons for termination were pretextual; (2) as to Count IV, because Thomas and Schlegel interfered with his employment contract contract for personal gain and vendetta; (3) as to Count V, because the defendants interfered with his legitimate expectation that he would be gainfully employed in the insurance/securities industry and would market products to former clientele; (4) as to Count VI, because Schlegel defamed Cutright and the court improperly applied the doctrine of qualified immunity; (5) as to Count VII, because the agreements not to compete were geographically overboard and lacking in consideration; (6) as to Count VIII, because Metropolitan did not require that its agents create and retain certain information.

On appeal, Metropolitan assigns three errors. First, Metropolitan contends a life insurance company cannot be liable for failing to comply with W. Va. Code § 33-12A-3 when the

definition section of that article, W. Va. Code § 33-12A-2, exempts companies, such as Metropolitan, that sell only life or accident and sickness insurance. Next, Metropolitan contends the "good cause" termination provisions of W. Va. Code § 33-12A-3 violate the Supremacy Clause of the United States Constitution by conflicting with Title VII of the Civil Rights Act of 1964. Metropolitan argues Title VII pre-empts state law when state law permits an employment practice that is unlawful under Title VII. Metropolitan finally alleges that the damages award granted Cutright under W. Va. Code § 33-12A-3 wrongfully included future income. Metropolitan does not seek to disturb the jury award in Cutright's favor on Count III, vacation pay.

In Syllabus Point 2 of *Painter v. Peavy*, 192 W. Va. 189, 451 S.E. 2d 755 (1994), this Court said, "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E. 2d 770 (1963).' Syllabus Point 1, *Andrick v. Town of Buchannon*, 187 W. Va. 706, 421 S.E.2d 247 (1992)." The Court further explained i Syllabus Point 3 of *Painter, id.*, that "[t]he circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial."

After thoroughly reviewing the record and briefs that were submitted on appeal, we believe the circuit court did not err in granting summary judgment to Metropolitan on Counts I, IV, V, VI, VII, and VIII. We agree that Metropolitan "demonstrated a legitimate, non-pretextual and non-retaliatory reason for Plaintiff's discharge. . . including complaints of insubordinate behavior and inappropriate remarks." We also agree Cutright "failed to demonstrate even a prima facie case of tortious interference as those elements are set forth in *Torbett v.*

Wheeling Dollar Savings & Trust Co., 173 W. Va. 210, 314 S.E.2d 166 (1983),[3] with respect to [tortious interference with third party contract and prospective business relationships]." Similarly, we agree the record does not indicate Cutright had any personal knowledge that Schlegel made a defamatory remark. We agree the agreements not to compete entered into by Cutright are "reasonable by their terms and provisions," even of other employees negotiate better deals. Whether other employees do or do not have to execute such agreements os of no consequence to this case as this aspect "rises and falls with each individual case." Finally, we agree the policyholders' files, which were maintained by Cutright, were and continue to be the property of Metropolitan. The evidence indicates the files were generated in the course of employment and Cutright was compensated for maintaining the files;. The judgment of the Circuit Court of Harrison County is therefore affirmed on each of these issues.

However, for reasons we will discuss below, we believe the circuit court improperly granted summary judgment to Cutright on the issue of liability of Count II of the complaint, that is, termination in violation of state law. The court also erred when at the close of Cutright's presentation of evidence at trial, Metropolitan made a motion for a direct verdict which the court refused to grant. Metropolitan argued the state statute was persuaded by Title VIII under the Supremacy Clause of the United States Constitution.

W. Va. Code § 33-12A-3 (1984) states:

> No insurance company may cancel, refuse to renew or otherwise terminate a written contractual relationship with any insurance agent

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[3] Syllabus Point 2 of *Torbett v. Wheeling Dollar Savings & Trust Co.*, 173 W. Va.

who has been employed or appointed pursuant to that written contract by such insurance company for a period of more that five years, except for "good cause," as prescribed herein. If an insurance company proposes to cancel, fail to renew or otherwise terminate a contractual relationship with the agent, the company shall notify the agent by certified mail at least ninety days prior to the date upon which the company proposed to cancel, fail to renew to terminate the contractual relationship. Such notice shall include a statement of the grounds upon which the insurance company bases its decision to cancel, refuse to renew or terminate any contractual relationship.

The following matters are "good cause" for an insurance company to terminate the contractual relationship with its agent:

(a) The Criminal misconduct or gross negligence relating to the business or premises of the insurance agency;

(b) Fraud or moral turpitude;

(c) Abandonment or unattendance of the business or premises of the insurance agency for such period of time as may unreasonably interfere with the transacting of business;

(d) The failure by the agent to pay moneys over to the company for insurance contract sold by the agency;

(e) The death or disability of the agent; and

(f) Upon the company becoming insolvent or discontinuing any line of insurance for any business propose: Provided, That the

> insurance commissioner shall notify or cause to be notified in writing all agents of such insolvent insurance company that they are no longer entitled to any benefit under their contract with the insolvent company.

W. Va. Code §33-12A-2 (1984) defines "insurance company" os follows:

> (a) "Insurance company" means any individual, firm, or corporation engaged in the business of selling insurance in this State, excepting only. . .(2) companies engaged exclusively in the sale of life or accident and sickness insurance.

The central and threshold issue which is finally dispositive of this case is whether this state legislation is pre-empted by federal law. We believe the "good cause" provisions of W. Va. Code § 33-12A-3 conflict with the Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq* (1994). Under the Supremacy Clause[4] of the United States Constitution, state legislation that interferes with or in contrary to federal law is pre-empted by the federal law.[5]

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4 ArticleVI, Clause of the United States Constitution states: This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

5 We find it is not necessary for us to decide and discuss

"It is a familiar and well-established principle that the Supremacy Clause U.S. Const.. Art. VI, cl. 2, invalidates state laws that "interfere with, or are contrary to, federal law." *Hillsborough County, Florida v. Automated Medical Labarotories, Inc.*, 471 U.S. 707, 712, 105 S. CT. 2371, 2375, 85 L.Ed. 2d 714, 721)1985) (quoting *Gibbons v. Ogden*, 9 Wheat. 1, 211, 6 L. Ed. 23 (1824). In *Schneidwind v. ANR Pipeline Co.*, 485 U.S. 293, 299-30, 108 S. Ct. 1145, 1150-51, 99 L.Ed.2d 316, 325 (1988), the Supreme Court further explained by stating:

> Congress implicitly may define the extent to which its enactment pre-empt state law. In the absence of explicit statutory language, however, Congress implicitly may indicate an intent to occupy a given field to the exclusion of state law. Such a purpose properly may be inferred where the pervasiveness of the federal regulation precludes supplementation by the states, where the federal interest in the field is sufficiently dominant, or where the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose. Finally, even where Congress has not entirely displaced state regulation in a particular field, state law is pre-empted when it actually conflicts with federal law. Such a conflict will be found when it is impossible to comply with not

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Metropolitan's arguments (1) that the company is exempt from W.Va. Code § 33-12A-1 *et seq.* because Metropolitan sells only life and accident and health insurance in West Virginia, and (2) that the circuit court erred by finding as a matter of law Cutright had a written contract of employment, because we are reversing Metropolitan's liability to Cutright under the Supremacy Clause.

> state and federal law or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress [.] (Citations Omitted).

Simply put, the narrow "good cause" termination provisions listed in W. Va. Code §33-12A-3 permit unlawful conduct which is prohibited by title VII. The state statute, therefore, protects employees who violate these federal laws. Title VII itself expressly pre-empts "any such law which purports to require or permit the doing of any act which would be unlawful employment practice under this subchaprter." 42 U.S.C. §2000e-7 (1994).

Title VII prohibits sexual harassment in the workplace.[6] The Supreme Court has interpreted this language to prohibit work environments that are discriminatorily hostile or abusive. In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L.Ed.2d 295, 301 (1993), the Supreme Court said:

> Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or

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[6] 42 U.S.C. §2000e-2(a)(1) (1994) states:
It shall be an unlawful employment practice for an employer--(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]

national origin. 42 U.S.C. § 2000e-2(a)(1). As we made clear in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), this language is not limited to economic or tangible discrimination. The phrase terms, conditions, or privileges of employment evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment. *Id.*, at 64, 106 S.Ct., at 2404, quoting *Los Angeles Dept. Of Water and Power v. Manhart*, 435 U.S. 702, 707, n. 13, 98 S.Ct. 1370, 1374, 55 L.E.2d 657 (1978) (some internal quotation marks omitted). When the workplace is permeated with discriminatory intimidation, ridicule, and insult, 477 U.S., 65, 106 S.Ct., at 2405, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, *id.*, at 67, 106 S.Ct., at 2405 (internal brackets and quotation marks omitted), Title VII is violated.

The Supreme Court discusses a discriminatorily hostile or abusive work environment be stating:

> A discriminatorily abusive work environment, even one that does not seriously affected employees' psychological, well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. More over, even without regard to these tangible effects, the very fact that the discriminatorily conduct was so

> severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality ...

Harris at 22, 114 S.Ct. At 370-71, 126 L.Ed.2d at 302.

In this case, Cutright's conduct resulted in a situation where the workplace was permeated with discriminatory intimidation, ridicule of the three female clerical employees and insult which was so severe and pervasive that it created a hostile and abusive working environment, in clear and actionable violation of Title VII of the federal statute. Oddly enough, he could not be discharged under W. Va. Code § 33-12A-3, because his egregious misconduct does not fit one of the six listed grounds for discharge.

We find guidance in the federal Equal Employment Opportunity Commission's guidelines on sexual harassment. These guidelines state clearly that "[w]ith respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) know or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 C.F.R. § 1604. 11(d) (1996). The guidelines emphasizes the importance of an employer's preventative acts:

> (f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval. developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under title VII, and

developing methods to sensitive all concerned.

29 C.F.R. 1604.11(f) (1996).

Within this Congressional framework, an employer must have the ability to discipline employees who are creating a discriminatorily hostile work environment, through termination and the credible threat of termination. Depriving an employer of these potential sanctions severely and illegally handicaps employers' efforts to prevent, or respond to , conduct that creates an unlawful hostile work environment. In fact, the "good clause" termination provisions found in W. Va. Code § 33-12A-3 unlawfully deprive insurance companies of these very sanctions.

If we adopt the position Cutright urges upon us, we would be putting insurance companies in an untenable state. These companies could not possibly comply with both state and federal law. Either way they would have to pay. This results in an absolutely impossible legal situation. If a company fires someone for a reason not on the state statute's list, the company has to pay money damages. Conversely, if a company has good reason under Title VII to, but fails to, fire someone because the reason is not listed in the state statute, the company still has to pay.

We note here that in insurance company can certainly continue to terminate the employment of an agent for any one of the six reasons enumerated in W. Va. Code § 33-12A-1 *et seq.* Conflicts with Title VII of the Civil Rights Act, Title Vii necessarily controls pursuant to the requirements of the Supremacy Clause of The United States Constitution, and, therefore, an insurance company may terminate the employment of an agent for creating a discriminatorily hostile or abusive work environment. Obviously, when an agent is fired under Title VII, the company does not have to comply with the ninety-day notice provided in W. Va. Code § 33-12A-3.

Therefore, the decision of the Circuit Court of Harrison County granting summary judgment is affirmed, except insofar as it allowed the issue of liability for termination of employment in violation if state law to go to the jury. The order is reversed on such point and the $1,000,00 portion of the verdict entered in Cutright's favor is set aside and this Court Declares that any claim on such basis is barred by the Supremacy Clause of the United States Constitution.

Affirmed in part and reversed in part.

APPENDIX C

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

January 1997 TERM

No. 23365

METROPOLITAN LIFE INSURANCE COMPANY
Petitioner Below, Petitioner

v.

CATHY S. GATSON, CLERK OF THE CIRCUIT COURT OF KANAWHA COUNTY; THE BOARD OF REVIEW OF THE WEST VIRGINIA DEPARTMENT OF EMPLOYMENT SECURITY; JAMES G. DILLON, CHAIRMAN; PHYLLIS CARTER AND G. CHARLES HUGHES, MEMBERS; ANDREW N. RICHARDSON, COMMISSIONER OF WEST VIRGINIA DEPARTMENT OF EMPLOYMENT SECURITY; AND WILLIAM E. CUTRIGHT
Respondents Below, Respondents.

Certiorari from the Circuit Court of Kanawha County
Honorable Paul Zakaib, Jr., Judge
Civil Action No. 95-AA-105

AFFIRMED

Submitted: January 29, 1997
Filed: July 14, 1997

David S. Russo, Esq. James A. Varner, Esq.

Michael A. Kawash, Esq. Harold M. Sklar, Esq.

Robinson & McElwee, McNeer, Highland, McMunn & Varner

Charleston, West Virginia

Attorneys for Petitioner Attorneys for Respondent

William E. Cutright

The Opinion of the Court was delivered PER CURIAM

Chief Justice Workman dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "The findings of fact of the Board of Review of the West Virginia Department of Employment Security are entitled to substantial deference unless a reviewing court believes the findings are clearly wrong. If the question on review is one purely of law, no deference is given and the standard of judicial review by the court is *de novo*."

2. "Unemployment compensation statutes, being remedial in nature, should be liberally construed to achieve the benign purposes intended to the full extent thereof." Syllabus Point 6, *Davis v. Hix*, 140 W. Va. 398, 84 S.E.2d 404 (1954).

Per Curiam:

Metropolitan Life Insurance ("Metropolitan") appeals the award of unemployment benefits to William Cutright, a former sales representative for Metropolitan. On appeal Metropolitan maintains that Mr. Cutright should be disqualified from benefits for seven weeks because he was discharged for insubordination. When the record is viewed in light of the remedial nature of unemployment compensation statutes, we find that the conclusion of law of the Circuit Court of Kanawha County and the Board of Review of the West Virginia Department of Employment Security is correct, and therefore, we affirm the decision of the circuit court awarding Mr. Cutright unemployment benefits.

Facts and Background

Although there is considerable dispute between the parties about the employment relationship between the parties about the employment relationship between Metropolitan and Mr. Cutright, the facts relevant to this appeal are limited to the question of Mr. Cutright's alleged insubordination. Mr. Cutright began working for Metropolitan on April 3, 1988 and at various times served as a branch manager and a sales representative. At the time of his discharge on October 14, 1994, Mr. Cutright was a sales representative.

As a sales representative, Mr. Cutright privately retained and paid Shellie Davis to work as his personal assistant in the Metropolitan office. Ms. Davis' responsibilities included accessing information on the policies of Mr. Cutright's clients held in Metropolitan's "sonic computer". Sometime in July 1994, William Thomas, Metropolitan's Branch Manager, saw Ms. Davis using the sonic computer with Mr. Cutright viewing the screen over her shoulder. Mr. Thomas informed Mr. Cutright that Ms. Davis' access to the sonic computer was improper. Mr. Thomas testified that sometime after the July

1994 incident, he may have "caught" Ms. Davis using the sonic computer in Mr. Cutright's absence.

On September 2, 1994, Mr. Cutright received an electronic message from Metropolitan Regional Executive Michael Schlegel stating the access to the sonic computer was limited to Metropolitan employees. Mr. Cutright disagreed with the limitation based on his experience as a branch manager. On September 20, 1994, Mr. Schlegel sent an electronic message to all the Metropolitan employees in the region telling them that non-Metropolitan employees were not to have access to the sonic computer.

Mr. Thomas, the branch manager, testified that the purpose of September 20, 1994 message was "to make sure that if there was any question in anybody's mind that in fact this is how Met Life mandates use of the sonic." Mr. Thomas did not indicate any other Metropolitan policy addressing the question of access to the sonic computer. When Mr. Thomas was asked if Ms. Davis had accessed the sonic computer after the September 20, 1994 directive, he answered that he did not know.

After Mr. Cutright was discharged on October 14, 1994 for behavior unbecoming to a sales representative and for insubordination, he filed for unemployment benefits, which were initially granted. Metropolitan appealed and the matter was heard by an administrative law judge who found that the "complaints about the claimants conduct.., did not amount to disqualifying misconduct" and that the "continued use of the computer by the claimant's private employee... does amount to insubordination which in turn amount to disqualifying misconduct." Based on the alleged insubordination, the administrative law judge found Mr. Cutright eligible but disqualified for benefits "for the week of the discharge and the six weeks immediately following thereafter."

Mr. Cutright appealed the denial to the Board of Review, which found Mr. Cutright was not qualified because the computer was not used "after the employer requested that the claimant's private secretary not use the sonic computer." The Board of Review also found the allegation of unbecoming conduct was not substantiated by Metropolitan. Metropolitan then appealed only the "insubordination issue" to the circuit court, which affirmed the Board of Review and adopted the Board's findings of fact and conclusions of law with one exception. The circuit court found that although Mr. Cutright permitted his personal secretary to use to use the sonic computer until Mr. Cutright received the written notification of the policy he requested, no improper access was done after written notice was given,

Metropolitan then appealed to this Court alleging: first, that the circuit court erred as a matter of law in finding that Mr. Cutright's conduct did not rise to the level of "actionable misconduct;" second, that the circuit court erred in considering additional evidence.

II.

Discussion

Our standard of review for a decision of the Board of Review was stated in Syllabus Point 3, *Adkins v. Gatson*, 192 W. Va. 561, 453 S.E.2d 395 (1994).

The findings of fact of the Board of Review of the West Virginia Department of Employment Security are entitled to substantial deference unless a reviewing court believes the findings are clearly wrong. If the question on review is one purely of law, no deference is given and the standard of judicial review by the court is *de nova*.

Accord Syllabus Point 3, *Smittle v. Gatson*, 195 W. Va. 416, 465 S.E. 2d 873 (1995).

See Philyaw v. Gatson, 195 W. Va. 474, 476, 466 S.E. 2d 133, 135 (1995); *W. Va. Code§* 21A-7-21 [1943].

In this case, the circuit court correctly reviewed the Board's findings of fact under a clearly wrong standard, which is the same standard we apply to the findings of fact adopted by the circuit court. However, we apply e *de nova* review to the legal conclusion of Board of Review and the circuit court that the claimant's conduct was not "misconduct" for the he purpose of disqualifying him from seven (7) weeks of unemployment compensation benefits.

We begin by noting that the unemployment compensation law should be liberally construed in order to further its remedial purpose. Syllabus Point 6, *Davis v. Hix*, 140 W. Va. 398,.4 84 S.E.2d 404 (1954) states: "Unemployment compensation statutes, being remedial in nature, should be liberally construed to achieve the benign purposes intended to the full extent therefor." *Accord* Syllabus Point 2, *Smittle v. Gatson, supra;* Syllabus, *Mercer Cty. Bd of Educ, v. Gatson*, W. Va. 251, 412 S.E. 2d 249 (1991).

Metropolitan seeks to have the claimant's disqualified from receiving benefits for seven weeks by virtue of *W. Va Code*, §21A-6-3 [1990], which provides, in pertinent part:

Upon the determination of the facts by the commissioner, an individual shall be disqualified for benefits:

***

(2) For the week in which he was *discharged from his most recent work for misconduct* and the six weeks immediately

following such week; or for the week in which he was discharged from his last thirty-day employing unit for misconduct and the six weeks immediately following such week. Such disqualification shall carry a reduction in the maximum benefit amount equal to six times the individual's weekly benefit.

The issue before this Court is whether Mr. Cutright's actions constitute misconduct within the meaning of the statute.: We adopt the following definition of misconduct of *Kirk v. Cole*, 169 W. Va. 520, 524, 288 S.E. 2d 547, 550 (1982), *quoting, Carter v. Michigan Employment Security Commission*, 364 Mich. 538, 111 N.W. 2d 817 (1961):

[Misconduct is] conduct evincing such willful and wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his employer. On the other hand ere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute.

In this case, we find that Mr. Cutright's continued use of a privately retained and paid secretary to access Metropolitan private files via the sonic computer after verbal warnings, but before a written confirmation of the prohibition does not constitute "misconduct" within the meaning of the statute. If Mr. Cutright had continued to allow his privately retained secretary to access Metropolitan's records after receiving written conformation of the prohibition, such acts would constitute "misconduct" because they would be a deliberate violation of the

company policy and they would "show an intentional and substantial disregard of the employer's interest." *Kirk v. Cole, id.*

Given the record, especially the testimony of Mr. Thomas, we find that the circuit court's finding of fact that after Mr. Cutright received written confirmation of the denial of access to company records for all non-employees on September 20, 1994, he did not violate the policy is not clearly wrong. We find that the circuit court correctly determined that Mr. Cutright's actions of allowing his privately retained secretary to access company records which occurred before he had written notice of the company policy did not constitute "misconduct" under *W. Va. Code*,§ 21A-6-3 [1990] so as to deny him seven weeks of unemployment benefits.

Accordingly, we affirm the judgment of the Circuit Court of Kanawha County affirming the final order of the Board of Review.

Affirmed.

1. This appeal comes to this Court in a writ of certiorari. *W. Va. Code*,§ 21A-7-27 [1970] states:

The appeal from the decision of the circuit of Kanawha county may be taken to the supreme court of appeals if a proper petition or certiorari is filed within sixty days of the date of the final decision of the circuit court of Kanawha county. The cases shall go from the circuit court of Kanawha county only on writ of certiorari and need be heard only at the session of the supreme court.

2. In addition to this appeal of the award of unemployment benefits to Mr. Cutright, the parties have two additional appeals pending before this Court. The other appeals arise from Mr.

Cutright's wrongful discharge suit against Metropolitan. *See Cutright v. Metropolitan Life Ins. Co.*, ____W. Va. ___, ___ S.E.2d ____ (Nos. 26684 and 26956, July 11, 1997). This unemployment appeal arose in a separate and distinct unemployment proceeding that is unrelated to the other appeals, which are based on matters heard by the Circuit Court of Harrison County.

3. The following testimony was given by Mr. Thomas at the January 25, 1995 hearing before the administrative law judge for unemployment benefits. :

Q (Mr. Sklar, Counsel for Mr. Cutright) Well, I understand what it says, to clarify. If that's the rule, why does it need clarification?

A (Mr. Thomas) You know, to reenforce. You know, look, this is what the rule is. This is it. This is the mandate that Met has, we have to adhere to it. That's why, I'm assuming, he did that.

Q But you don't know why? You don't have anything in a manual of instruction, for example? He doesn't reference the manual of instruction, which is your bible, that says pursuant to page 54 of the manual of instruction nobody but Met Life employees can use the sonic, correct?

A No, he did not reference that.

Q And you don't have anything between the 20th of September until the 14th, a three week period of time. To Mr. Cutright saying, Bill, you're in violation of the pronouncement on September 20, I caught you, I caught Shellie using that again. Correct?

A No. We might have had verbal discussions again. I didn't--

Q But you didn't know?

A Right.

Q And you don't know what date those verbal discussions were/

A From July to the time he was terminated.

Q Right, but you don't know--

A (inaudible) continuous.

Q But you don't know if they were after the 20th of September ?

A No, I don't.

Q So it may well have been that after receipt of this electronic mail on September 20 until he was terminated some three weeks later that perhaps Shellie Davis did not access sonic?

A Shellie Davis was accessing sonic--again, I can give you probably a more specific date, but--

Q But a moment ago you said you didn't know whether between this date and his termination whether she accessed sonic.
A No, I--I mean I don't know the date, no sir. It was after three months of, you know, letters and talks.

4. Metropolitan also alleged that Mr. Cutright engaged in conduct unbecoming one of its sales representatives. The alleged conduct included a comment about a female clerk made outside the office building and loudly talking in the office. This issue was rejected by the administrative law judge and the Board of Review. In its appeal to the circuit court, Metropolitan did not appeal the Board of Review's rejection of the unbecoming

conduct discharge argument. Because the unbecoming conduct issue is not before this Court in this appeal, the issue is not considered in this appeal.

5. In our review of the record, we found no evidence that the circuit court considered the additional evidence submitted by Mr. Cutright, and therefore, we find no merit in this agreement of error.

No. 23365 -Metropolitan Life Insurance Co. V. Cathy S. Gatson, Clerk of the Circuit Court of Kanawha County, the Board of Review of the West Virginia of the West Virginia Department of Employment Security; and William Cutright

Workman, C.J., dissenting:

While the majority correctly identifies the issue for the Court's resolution as a legal determination of whether Mr. Cutright's conduct legally rises to the level of misconduct contemplated by West Virginia Code § 21-A-6-3(1996) to permit disqualification from unemployment benefits, I must respectfully dissent because I conclude that the requisite misconduct was established:. The majority places great stock in the fact that Mr. Cutright curtailed the wrongful use of the sonic computer by his personal assistant following the issuance of a written rule regarding the nonauthorization of the computer system's use by individuals other than Metropolitan employees. Why the majority concludes that it was permissible for Mr. Cutright to be insubordinate to his superior's directive regarding company work prior to the time a written company directive was issued is incomprehensible to me.

This Court recognized in Perry v. Rutledge, 1477 WE. Va. 548, 355 S.E. 2d 41 (1987) that "[a] refusal to comply with a job assignment directive or a work rule may constitute 'misconduct' for unemployment compensation purposes." Id.

At 551, 355 S.E. 2d at 44. We explained in Perry that the "job assignment directive or work rule must be reasonable under the particular circumstances, and the unemployment compensation claimant's reason for disregarding the job assignment directive or work rule must be examined to determine whether the claimant was justified, or at least exercised good faith, in not complying with the directive or rule. "Id the burden is placed on the claimant to prove that "he or she was justified, or at least exercised good faith, in not complying with the directive or rule." 177 W. Va. At 552, 355 S.E.2d at 45.

Because the majority failed to consider whether Mr. Cutright's failure to obey an oral directive regarding a work rule constituted misconduct, I find the majority's reasoning to be flawed. There is simply no basis for the majority's implication that a deliberate violation of company policy cannot result absent a written policy. Whether the directive was oral or written, the failure of Mr. Cutright to comply with his supervisor's instructions regarding use of the sonic computer qualifies as misconduct within the definition adopted by this Court in Kirk v. Cole, 169 W. Va. 520, 288 S.E. 2d 547 (1982), as it clearly constituted both a flagrant disregard of a standard of behavior that Metropolitan had a right to expect and a disregard of his obligations to his employer. See id. at 524, 288 S.E. 2d at 550.

Moreover, the majority wrongfully decided to gloss over the additional allegations of misconduct involving Mr. Curtright's habit of making derogatory and demeaning comments with regard to a female clerk and his boisterous and profane demeanor within the office. The existence of these allegations certainly should have been considered in determining whether Mr. Cutright was entitled to unemployment benefits since that conduct was part of the initial evidence used to support the employer's position that his misconduct barred him from receiving benefits for the period of time provided by statute. See W. Va. § 21-A-6-3.

It is amazing how frequently we are seeing instances of abusive people being rewarded by the legal system for their abusive behavior.

APPENDIX D

STATE OF WEST VIRGINIA

At a regular time of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 29th day of October, 1998, the following order was made and entered:

William E. Cutright, Plaintiff
Below, Petitioner

v.

Metropolitan Life Insurance Company,
d/b/a "Metlife", Michael A. Schlegel and
William Thomas, Defendants Below,
Respondents

On a former day, to-wit, September 8, 1998, came the petitioner, William E. Cutright, be Brent E. Beveridge, his attorney, and presented to the Court his petition praying for an appeal from a judgment of the Circuit Court of Harrison County, rendered on the 20th day of April, 1998, with the record accompanying the petition. Thereafter, on the 22nd day of September, 1998, came the respondent, Metropolitan Life Insurance Company, d/b/a :Metlife", by Robinson & McElwee, and Jeffrey A. Kimble, its attorneys, and presented to the Court its written response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal. Justice McKuskey would grant.

A True Copy

Attest: Debra Z. McHenry
Clerk, Supreme Court of Appeals

Supreme Court, U.S.
FILED
MAY 19 1999
OFFICE OF THE CLERK

No. 98-1656

IN THE

Supreme Court of the United States

WILLIAM E. CUTRIGHT,

Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY, d/b/a "METLIFE", MICHAEL A. SCHLEGEL and WILLIAM THOMAS,

Respondents.

On Petition for a Writ of Certiorari to the West Virginia Supreme Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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1988

QUESTION PRESENTED

Should this Court grant certiorari to decide if plaintiff's Due Process rights were violated by a supposed inconsistency between two decisions of the same state court when: (a) he failed to preserve the Due Process issue below; (b) due to the procedural posture of this case, the Due Process issue plaintiff described in his Question Presented is not properly before this Court; (c) the argument he seeks to raise is barred by *res judicata* or collateral estoppel, since he asserted the same theory in a separate federal lawsuit (a proceeding he omitted to disclose in his Petition); and (d) the alleged "inconsistency" consists of the state court's dual determinations that plaintiff is entitled to unemployment benefits, but is not entitled to punitive or compensatory damages for wrongful discharge?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Metropolitan Life Insurance Company, has no parent company and does not issue stock.

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STATEMENT OF THE CASE

A. Factual Background

Plaintiff was employed as an insurance agent for defendant, Metropolitan Life Insurance Company ("MetLife"). In 1994, he was fired for a combination of two offenses: unprofessional conduct and insubordination.

Unprofessional Conduct: Plaintiff was abusive to female clerical employees. He "repeatedly yelled at the women, often adding profanity. . . . [H]e 'cursed and yelled and threw things.' " *Cutright v. Metropolitan Life Ins. Co., et al.*, 491 S.E.2d 308, 310 (W. Va. 1997). Several women complained, and MetLife warned him to stop, but the warning had "little or no effect." *Cutright*, 491 S.E.2d at 311. Less than one month later, "another incident involving crass, hostile behavior and the use of profanity occurred." *Cutright*, 491 S.E.2d at 311 (he called one clerical employee a "fat ass bitch," and said others were "f_ _ _ing nuts"). *Cutright*, 491 S.E.2d at 311. Plaintiff's conduct created a "workplace permeated with discriminatory intimidation [and] ridicule of the three female clerical employees." *Cutright*, 491 S.E.2d at 316.

Insubordination: Around the same time, plaintiff was directly ordered by his superiors, defendants Thomas and Schlegel, to stop granting a non-employee "full access to [MetLife's] computer system." *Cutright*, 491 S.E.2d at 311. He replied, in writing, that he would not follow that order "until he received notice from the legal department." *Cutright*, 491 S.E.2d at 311.

B. Nature Of Plaintiff's Claims

In one lawsuit, plaintiff filed a routine claim for unemployment benefits. In a separate state court lawsuit, he pursued a wrongful discharge claim, seeking punitive and compensatory damages. Specifically, he claimed he was terminated in violation of W. Va. Code 33-12A. This statute, which only applies to a subset of insurance agents, narrowly limits the reasons for discharge to six specified grounds. As construed by West Virginia's highest court, it prohibits some insurance agents from being fired for abusing and harassing co-workers, even if their behavior is so eggregious that it violates laws against sexual harassment, because such conduct "does not fit one of the six listed grounds for discharge." *Cutright*, 491 S.E.2d at 316. Finally, plaintiff filed a third lawsuit, in federal court, in which he tried to collaterally attack the state court's judgment.

C. Procedural History

Wrongful Discharge Claim — Round One: Petitioner ("plaintiff") filed suit in state court seeking to recover damages under W.Va. Code 33-12A. A jury awarded him $1 million, but the West Virginia Supreme Court of Appeals reversed and entered judgment for defendants. It held that the state statute is pre-empted under the Supremacy Clause because it conflicts with Title VII, 42 U.S.C. § 2000 *et seq.* *Cutright*, 491 S.E.2d 308 (henceforth, "*Cutright I*"). Plaintiff did *not* seek a writ of certiorari to review *that* decision.

The Unemployment Case: Four days after issuing its decision in *Cutright I*, the West Virginia Supreme Court of Appeals affirmed plaintiff's entitlement to unemployment

benefits. *Metropolitan Life Ins. Co. v. Gatson*, 490 S.E.2d 743 (W. Va. 1997) (henceforth, the "*Unemployment Case*"). This did *not* prompt him to petition for a writ of certiorari to review the supposed inconsistency.

Wrongful Discharge Claim — Round Two: In August 1997, plaintiff filed a motion for rehearing in the West Virginia Supreme Court of Appeals. He argued that the Court's two decisions conflict with each other, so it should vacate its decision in *Cutright I*. The court denied his motion. (Order dated Sept. 3, 1997). Plaintiff did *not* seek a writ of certiorari to review that decision — and the deadline for doing so expired a year ago.

* * *

Instead of giving up, plaintiff fired the attorney who had been representing him and sued that gentleman for malpractice. *Cutright v. McNeer, Highland, McMunn & Varner, L.C.*, No. 98-C-251-1 (Harrison Cty., W. Va.). His new lawyer tried to re-litigate the issues plaintiff had lost, simultaneously pursuing two collateral attacks (one in state court, the other in federal court).

Wrongful Discharge Claim — Round Three: Plaintiff and his new lawyer went back to the West Virginia circuit court (i.e., trial court) and filed a motion, under Rule 60(b), for relief from judgment. He expressly asked the circuit court to overrule its own Supreme Court of Appeals; i.e., to declare the higher court's decision "a nullity." His motion was denied. (Order dated April 21, 1998) (Appendix B to the Petition).

The Federal Lawsuit: Plaintiff went forum shopping and filed a new lawsuit in federal court. *Cutright v. Metropolitan Life Ins. Co.*, No. 1: 98CV23 (N.D. W. Va. 1998) (henceforth, "*Cutright II*"). He asserted that there is a "conflict between the two decisions" issued by the Supreme Court of Appeals (Plaintiff's Response To Defendants' Motion To Dismiss, p. 6) — the same argument he seeks to raise in the present Petition, and the same one he unsuccessfully raised in his motion for rehearing in the Supreme Court of Appeals. Then he claimed that the supposed inconsistency violates the Due Process Clause, the Equal Protection Clause, and/or 42 U.S.C. § 1983. The district court dismissed plaintiff's lawsuit for failure to state a claim.[1] (Order dated Sept. 11, 1998). Plaintiff did *not* appeal this final judgment to the Fourth Circuit.

Wrongful Discharge Claim — Round Four: Plaintiff tried to go back to the Supreme Court of Appeals yet again. He filed a Petition To Appeal (the West Virginia equivalent of a certiorari petition), requesting discretionary review of the circuit court's denial of his Rule 60(b) motion. The Supreme Court of Appeals denied his petition. (Order dated October 29, 1998) (Appendix D to Certiorari Petition). *This* order is the order plaintiff now asks the United States Supreme Court to review.

D. Details re: The Order From Which Plaintiff Seeks Certiorari

When the circuit court denied plaintiff's Rule 60(b) motion, it never ruled on the merits of his argument (i.e.,

---

1. The district court also seriously considered a Rule 11 motion and held oral argument on this subject, but ultimately decided not to impose sanctions.

do the state Supreme Court's two decisions conflict with each other?). Rather, it held that a circuit court "lacks jurisdiction," and "does not have the authority," to "vacate and void a final judgment of the West Virginia Supreme Court," whether or not the lower court agrees with higher court's decision. (4/21/98 Order).

This question about how authority is divided among state courts — whether a circuit court can nullify a higher court's decision — is the one West Virginia's Supreme Court of Appeals declined to hear. Indeed, when plaintiff filed his Petition To Appeal, that was the issue he asked the Court to consider. His pertinent assignments of error were as follows[2]:

> 1. The trial court erred in refusing to rule that the West Virginia Supreme Court's opinion in Case No. 23884 [is] null and void.
>
> * * *
>
> 3. The trial court erred in determining that it lacked jurisdiction to vacate and void a judgment of the West Virginia Supreme Court of Appeals.

(Petition To Appeal, p. 6).

---

2. Assignment No. 2, omitted from the quotation in the text, asserted that the trial court erred when it allowed MetLife to amend its answer.

REASONS FOR DENYING THE WRIT

I. The Due Process Issue Plaintiff Seeks To Raise Was Not Preserved Below

When plaintiff filed his Rule 60(b) motion in the circuit court, he did not mention the Due Process Clause, nor any constitutional concerns. His motion asserted four (4) specific grounds for granting relief from judgment, which he framed as follows:

> "The grounds for plaintiff's motion requesting that the jury verdict be reinstated and that the order reversing the judgment herein be declared null and void are:
>
> A. The opinion of the West Virginia Supreme Court of Appeals in [the *Unemployment Case*] renders the Supreme Court's opinion in [*Cutright I*] null and void;
>
> B. The defendants' claims before this Court and the West Virginia Supreme Court of Appeals that the plaintiff was discharged for violations of Title VII of the 1964 Civil Rights Act was precluded by the failure to raise the issue in its pleadings and by their answer admitting the plaintiff was discharged for unprofessional conduct and insubordination.
>
> C. The defendants' claim before this Court and the West Virginia Supreme Court of Appeals that plaintiff was discharged for violations

> of Title VII of the 1964 Civil Rights Act [sic] was precluded by the decision of the West Virginia Supreme Court in the *Unemployment Case*.
>
> D. The defendants' filing of an Amended Answer without first obtaining leave of Court as required by Rule 15(a) of the West Virginia Rules of Civil Procedure constitutes a fraud upon the Court thereby nullifying any judgment based upon the constitutionality of West Virginia Code § 33-12A-1, *et seq.*"

(Appendix A to Certiorari Petition). Likewise, in his Petition To Appeal, plaintiff did not contend that his constitutional rights had been violated. He argued only that the "trial court erred" in denying his Rule 60(b) motion. (Supra, p. 5) (quoting plaintiff's Petition To Appeal).

This alone is sufficient grounds to deny the present certiorari petition. *See White River Lumber Co. v. State of Arkansas*, 279 U.S. 692, 700 (1929) (an issue is "necessarily excluded from our consideration" if it was not "presented in or passed upon" by the state Supreme Court).

II. The Due Process Issue Described In Plaintiff's "Question Presented" Is Not Properly Before This Court

Due to this case's procedural posture, the only issue that could properly be reviewed by this Court at the present time is:

> Did the West Virginia Supreme Court of Appeals err by exercising its discretion not to hear an appeal when the issue presented by the appeal would have been: can a state circuit court nullify the state Supreme Court's decisions?

Plaintiff did not seek a writ of certiorari in 1997, when the Supreme Court of Appeals issued its decisions in *Cutright I* and the *Unemployment Case*. Nor did he seek a writ of certiorari later in 1997, when the same court denied his motion for rehearing in *Cutright I* (in which he asserted that its two decisions conflict). The time for seeking a writ to review either of *those* two decisions expired long ago.

III. The Argument Plaintiff Seeks To Make Here Is Barred By Res Judicata Or Collateral Estoppel

In a separate federal lawsuit, *Cutright II*, plaintiff made the same argument he seeks to re-litigate here. He asserted that his Due Process rights had been violated, and that the Supreme Court of Appeals did something improper by issuing two conflicting decisions. The following is an excerpt from a brief he filed in *Cutright II*:

> [T]he West Virginia Supreme Court rendered two separate opinions regarding Mr. Cutright's employment relationship with Metropolitan. . . . Quite simply, how can Title VII preempt the just cause provisions of *West Virginia Code* § 33-12A-3 and not the misconduct disqualification of *West Virginia Code* § 21A-6-3 [unemployment benefits] when the same conduct is at issue? * * * The real enigma in this case is that [the Supreme Court of Appeals] had

> the same set of facts before it in two separate cases and reached different results. . . . [There is] a conflict between the two decisions. . . .

(Cutright's Response To Defendants' Motion To Dismiss in *Cutright II*, pp. 5-6).

The federal district court entered a final judgment against plaintiff, and he did not appeal that decision. In such circumstances, the doctrines of *res judicata* and/or collateral estoppel preclude him from re-litigating the same issue in the present proceeding. *See Willy v. Coastal Corp.*, 503 U.S. 131, 137 (1992) (even if the district court lacked subject matter jurisdiction, a judgment it rendered while under the "misapprehension that it had jurisdiction" still is entitled to *res judicata* effect and cannot be attacked in a "collateral" proceeding).

IV. There Is No "Inconsistency" Between The State Court's Two Decisions, Let Alone One That Rises To The Level Of A Due Process Violation

Plaintiff argues that if Title VII does not preclude him from receiving unemployment benefits, then it cannot preempt an award of punitive and compensatory damages under West Virginia's wrongful discharge statute. Conversely, he asserts, if his conduct qualified as sexual harassment within the meaning of Title VII, then it must also qualify as "misconduct" under the unemployment compensation statute, which would disqualify him from receiving benefits. In either event, he concludes, this is a "both or neither" situation: there is no way the state court could properly permit recovery in the *Unemployment Case* but reverse his award in *Cutright I*. He then insists, without

any pertinent authority, that this supposed inconsistency rises to the level of a Due Process violation. His theory is meritless because: (a) the state court's decisions are not inconsistent; and (b) even if they were, there still would not be a Due Process violation.

A. Details re: The Decision In The *Unemployment Case*

The Supreme Court of Appeals explained that its decision in the *Unemployment Case* was limited by two factors. First, in that case, MetLife **waived** any argument that plaintiff's harassment of female co-workers disqualified him from receiving unemployment benefits:

> [T]he facts relevant to this appeal are limited to the question of Mr. Cutright's alleged insubordination. * * * [During the administrative hearing,] Metropolitan also alleged that Mr. Cutright engaged in conduct unbecoming one of its sales representatives [i.e., harassing female clericals]. . . . [However,] in its appeal to the circuit court, Metropolitan did not appeal the Board of Review's rejection of the unbecoming conduct discharge argument. Because the unbecoming conduct issue is not before this Court in this appeal, [that] issue is not considered in this appeal.

Unemployment Case, 490 S.E.2d at 745, 746 n.4.

Second, judicial review of an administrative agency's decision to award unemployment benefits is very narrow. This is due to "remedial nature" and "benign purposes" of

the unemployment compensation statute, and because the agency's decision is "entitled to substantial deference" (it can be reversed only if "clearly wrong"). *Unemployment Case*, 490 S.E.2d at 744.

Applying these rules, the court affirmed the Review Board's finding that plaintiff's insubordinate behavior did not disquality him from receiving unemployment benefits.

B. Legal Analysis

Since MetLife *waived* the sexual harassment and Title VII preemption arguments in one case, but not in the other, there is nothing inconsistent about the state *court's* decisions. The Supreme Court of Appeals properly considered the sexual harassment and preemption issues only in the lawsuit where a party raised it.

Further, holding that the wrongful discharge statute is preempted, but the unemployment compensation statute is not, is the correct result. The wrongful discharge statute made it *unlawful* to fire an insurance agent for sexual harassment, no matter how flagrantly he harassed co-workers or how many warnings he ignored. It also imposed punitive and compensatory damages on any employer who violated this state law. Such a state statute clearly interfered with Title VII's goals, and/or with an employer's ability to comply with Title VII. Requiring an employer to pay unemployment benefits when it terminates an agent for sexual harassment is not remotely comparable. The magnitude of the exposure is far less, *and* the employer is not stigmatized as a lawbreaker (the award merely reflects a policy decision to have a safety net for people who lose their jobs). Thus, the unemployment statute does not interfere with Title VII.

Finally, even assuming *arguendo* that the two decisions were somewhat "inconsistent," there still would be no Due Process violation. Plaintiff concedes that "*ordinarily*, erroneous or conflicting decisions rendered by the highest court of a State is *not* a denial of due process." (Petition For Certiorari, p. 10) (emphasis added). Only in an extraordinary case would such an inconsistency rise to the level of a constitutional violation. This is not such a case, because there was nothing "arbitrary" about what occurred here.

Based on public policy considerations, West Virginia long ago concluded that it is not important for the outcome in an unemployment benefits case to be "consistent" with the decision in a wrongful discharge or discrimination lawsuit. Thus, West Virginia *always* declines to give the decision in an unemployment case any *res judicata* or collateral estoppel effect in other civil actions. E.g., *Page v. Columbia Natural Resources, Inc.*, 480 S.E.2d 817, 832 (1996); *Slack v. Kanawha County Housing and Redevelopment Authority*, 423 S.E.2d 547, 558 (1992). Many states, including California and Ohio, have reached the same policy conclusion; they, too, deny preclusive effect to findings made in unemployment cases. *E.g.*, *Pichon v. Pacific Gas & Elec. Co.*, 260 Cal. Rptr. 677, 687-88 (Cal. App. 1989) (state statute prohibits courts from giving preclusive effect to any determination made in an unemployment case); *Ohio Revised Code* § 4141.28(R) (same).

CONCLUSION

For all of the preceding reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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